

# NEW YORK COURT OF APPEALS

## People v. Townsley

20 N.Y.3d 294 (2012) · Decided November 27, 2012

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### SUMMARY

The New York Court of Appeals held that appellate counsel was not ineffective for failing to argue that prosecutorial comments about defense counsel's meeting with a potential witness created a conflict of interest or deprived the defendant of effective trial counsel. The court concluded that the defense lawyers were not necessarily required to testify and that, although the prosecutor's summation was inappropriate, it did not establish a conflict requiring a trial-court inquiry or reversal. The court affirmed the denial of coram nobis relief.

### OPINION

SMITH, J.

OPINION OF THE COURT Smith, J. In this proceeding for a writ of error coram nobis, defendant claims that he was deprived of the effective assistance of appellate counsel in an earlier appeal. Specifically, he claims appellate counsel was at fault for failing to argue, on appeal, that the conduct of the prosecutor at trial subjected defendant's trial lawyers to ethical conflicts and thereby deprived defendant of the effective assistance of trial counsel.

We hold that defendant has failed to demonstrate that his appellate counsel was ineffective. I Defendant was convicted in 1995 of murder, attempted murder, assault and weapons offenses after a trial in which witnesses testified that he shot two members of a rival drug gang, killing one and wounding the other.

The theory of the defense at trial was that the "real killer" was not defendant, but the leader of defendant's gang, Simeon Nelson, known as "Sims," who, according to several witnesses' testimony, was present when the shootings took place. Nelson did not testify at trial. Defendant's request for a missing witness instruction was denied, but defense counsel made a missing witness argument \*297in summation: "Simeon Nelson, who you didn't hear from, sits in the catbird seat this afternoon." The principal issues now before us arise from defense counsel's effort to interview Nelson before trial, and the prosecutor's attempts to use that effort to the People's advantage.

On cross-examination of defendant, the prosecutor established that, after the shootings, defendant and Nelson were incarcerated in the same jail at the same time. The prosecutor asked defendant if he and his lawyers had met with Nelson on the morning of the first day of trial. Defendant

acknowledged that he had seen his lawyers meeting with Nelson that day, but denied that he had attended the meeting.

Commenting in summation on this line of questioning by the prosecutor, defense counsel told the jury sarcastically: “Well, I’m sorry that the lawyers for [defendant] wanted the real killer to come forward.” In the People’s summation, the prosecutor made the following comments about the meeting between Nelson and defense counsel: “I went and found out about their little secret meeting on April 25th.

The Defendant didn’t know that I knew, and he tried to backtrack and he tried to get flustered, and now the Defense lawyer told you it’s his duty and obligation to try to talk to the real killer. “Is there any testimony by anyone in this trial that they spoke to Sims and confronted him? No. No lawyer for Legal Aid got on the stand and testified. You have no evidence... that they confronted Sims. “No, they had their little meeting with Sims to see if he would help them save their client, say it wasn’t him, say it was somebody else, give us some information that could get our boy and your friend off.” Defense counsel did not object either to the prosecutor’s questions about the jailhouse meeting or the argument based on it.

Nor did defendant’s appellate counsel raise any issue relating to those questions or comments on the direct appeal from defendant’s conviction and sentence. The Appellate Division affirmed on direct appeal (*People v Townsley*, 240 AD2d 955 [3d Dept 1997]). Some 12 years later, defendant moved under CPL 440.10 to set aside his conviction, \*298arguing among other things that the prosecutor had accused defense counsel of trying to fabricate a defense, with the result that defendant was deprived of his right to conflict-free counsel.

County Court denied the CPL 440 motion, in part on the ground that the issue could have been raised on direct appeal. After the Appellate Division denied leave to appeal from the denial of the CPL 440 motion, defendant began the present coram nobis proceeding in the Appellate Division (see *People v Bachert*, 69 NY2d 593 [1987]), arguing that appellate counsel was ineffective for failing, among other things, to raise the conflict issue.

The Appellate Division denied coram nobis relief (2011 NY Slip Op 64401[U] [2011]). A Judge of this Court granted leave to appeal (17 NY3d 956 [2011]), and we now affirm. II Defendant’s principal argument proceeds in several stages. He argues that the prosecutor’s trial tactics created ethical problems for defendant’s trial counsel, who, according to defendant’s present argument, were put in a position where they should have called themselves as witnesses, and were also personally accused of wrongdoing.

These problems, defendant argues, should have led the trial court to conduct an inquiry and, unless the conflicts were validly waived, to disqualify trial counsel. The court’s error in failing to

proceed in this way, the argument continues, was so clear that appellate counsel's failure to argue it on appeal amounted to ineffective assistance of counsel.

The ultimate question raised by this argument is whether appellate counsel was ineffective. In addressing that question, we examine the merits of the underlying claim that trial counsel was conflicted, but in doing so we must remember that appellate counsel's omission of claims from his appellate brief "should not be second-guessed with the clarity of hindsight" (*People v Benevento*, 91 NY2d 708, 712 [1998]).

The constitutional requirement of effective assistance of counsel is met where "the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Appellate lawyers "have latitude in deciding which points to advance" and need not "brief or argue every issue that may have merit" (*People v Stultz*, 2 NY3d 277, 285 [2004]).

In reviewing the performance of appellate counsel, "the minimum standard of performance required... is a very tolerant one" (*People v Turner*, 5 NY3d 476, 480 [2005]). Viewing the case in that light, we conclude that appellate counsel was not ineffective. \*299Defendant first contends that his lawyers were subject to a "conflict" because the prosecutor's questioning and argument about defense counsel's meeting with Nelson made the defense lawyers into necessary witnesses at trial.

This argument lacks merit. The word "conflict" does not fully describe what is sometimes called the ' 'advocate-witness" problem. A lawyer who is both an advocate and witness does not necessarily have conflicting interests, though that possibility exists. But whether or not there is a conflict, such a mixture of roles may confuse the fact-finder and impair the fairness of the trial, and a lawyer is ethically required, subject to certain exceptions, to withdraw from a representation when he or she (in the words of the ethical rule as it existed when defendant was tried) "learns or it is obvious that the lawyer ought to be called as a witness on behalf of the client" (former Code of Professional Responsibility DR 5-102 [a] [22 NYCRR 1200.21 (a)]; cf. Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [a] [current, similar provision]).

One of the exceptions—where withdrawal "would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case" (Code of Professional Responsibility DR 5-101 [b] [4] [22 NYCRR 1200.20 (b) (4)]; cf. Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [a] [3])—might be relevant here, but the point is moot because a reasonable appellate counsel could well have concluded that the trial lawyers did not need to be called as witnesses at all.

The mere fact that defendant's lawyers had met with Nelson, and that the jury knew of the meeting, did not make it either necessary or appropriate for the lawyers to testify. The prosecutor presumably brought out the meeting to show that Nelson, whom the defense portrayed as a

missing witness, was not wholly in the People's control—a legitimate, if peripheral, point that the testimony of defense counsel could hardly have refuted.

Nothing in the record indicates that the defense lawyers could have said anything about the meeting that would have helped their client. It would no doubt be different if they could have testified that Nelson told them he committed the crimes, but there is no evidence that he told them anything of the kind. Defendant's second argument deserves more attention.

It is, in substance, that the prosecutor accused the defense lawyers of criminal wrongdoing—of attempting to get Nelson to tell a false story that would exculpate the lawyers' client. Such an accusation, while it would not automatically require disqualification, would, create at least a potential for conflict; when a lawyer's own conduct is in question, the lawyer may be impelled to protect himself at his client's expense (see Code of Professional Responsibility DR 5-101 [a] [22 NYCRR 1200.20 (a)]: “[A] lawyer shall not accept employment if the exercise of professional judgement on behalf of the client will be or reasonably may be affected by the lawyer's own... personal interests” [cf Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.7 (a) (2)]; see also e.g. *People v Konstantinides*, 14 NY3d 1 [2009]; *United States v Fulton*, 5 F3d 605 [2d Cir 1993]).

In this case, however, defendant's appellate lawyer could reasonably have concluded that the record did not show that any such accusation was made. The prosecutor's cross-examination of defendant about his lawyers' meeting with Nelson contained no suggestion of wrongdoing by defense counsel. It showed only that they had met with a possible witness—i.e., that they were doing their job.

The prosecutor's remarks about the meeting in closing argument are more troublesome. It was entirely inappropriate for the prosecutor to refer to the defense lawyers' “little secret meeting” with Nelson and to suggest that their purpose was “to see if he would help them save their client, say it wasn't him, say it was somebody else... get our boy and your friend off.” The argument suggested to the jury that there was something improper in a lawyer's interviewing a witness in the hope of getting favorable testimony.

That is not in the least improper. It is what good lawyers do. Thus, the prosecutor's closing argument warranted a rebuke from the trial judge. A reasonable appellate counsel could have concluded, however, that it warranted nothing more—specifically, that it did not warrant interrupting the trial to inquire whether defense counsel could still exercise independent judgment, and if not whether defendant would waive any conflict.

It would have been reasonable for appellate counsel to conclude that a reversal based on the trial court's failure to make such an inquiry was highly unlikely. The prosecutor's closing argument did not say, and could reasonably be read not to imply, that the defense lawyers asked Nelson to give

false testimony. Subornation of perjury is a serious crime, of course, but it hardly seems likely that the trial lawyers in this case should have believed, or did believe, that they were in danger of investigation or prosecution for committing it.

In other cases in which the issue of defense counsel's \*301personal culpability has been raised, the lawyers seemed to have much more serious problems. In *Konstantinides*, a witness specifically claimed that a defense lawyer asked her to lie (14 NY3d at 6); in *Fulton*, a witness had told prosecutors "that he had once imported heroin for Fulton's trial counsel" (5 F3d at 606).

In this case, the prosecutor's comments about defense counsel were far less specific. Trial counsel, and a reasonable appellate counsel reviewing the record, could well have taken them as nothing more than an obnoxious, but essentially irrelevant, way of describing a defense lawyer's legitimate activity. Now, in this *coram nobis* proceeding, defendant makes a perhaps plausible argument that the prosecutor's remarks were more than that, but we do not find the argument "so compelling that a failure to make it amounted to ineffective assistance of counsel" (*People v Carter*, 7 NY3d 875, 877 [2006]).

Defendant's remaining arguments do not require long discussion. While a few of the prosecutor's other remarks on summation may have been objectionable, they were of minor importance. Appellate counsel was not ineffective because he chose not to make an issue of them on appeal.

Accordingly, the order of the Appellate Division should be affirmed.